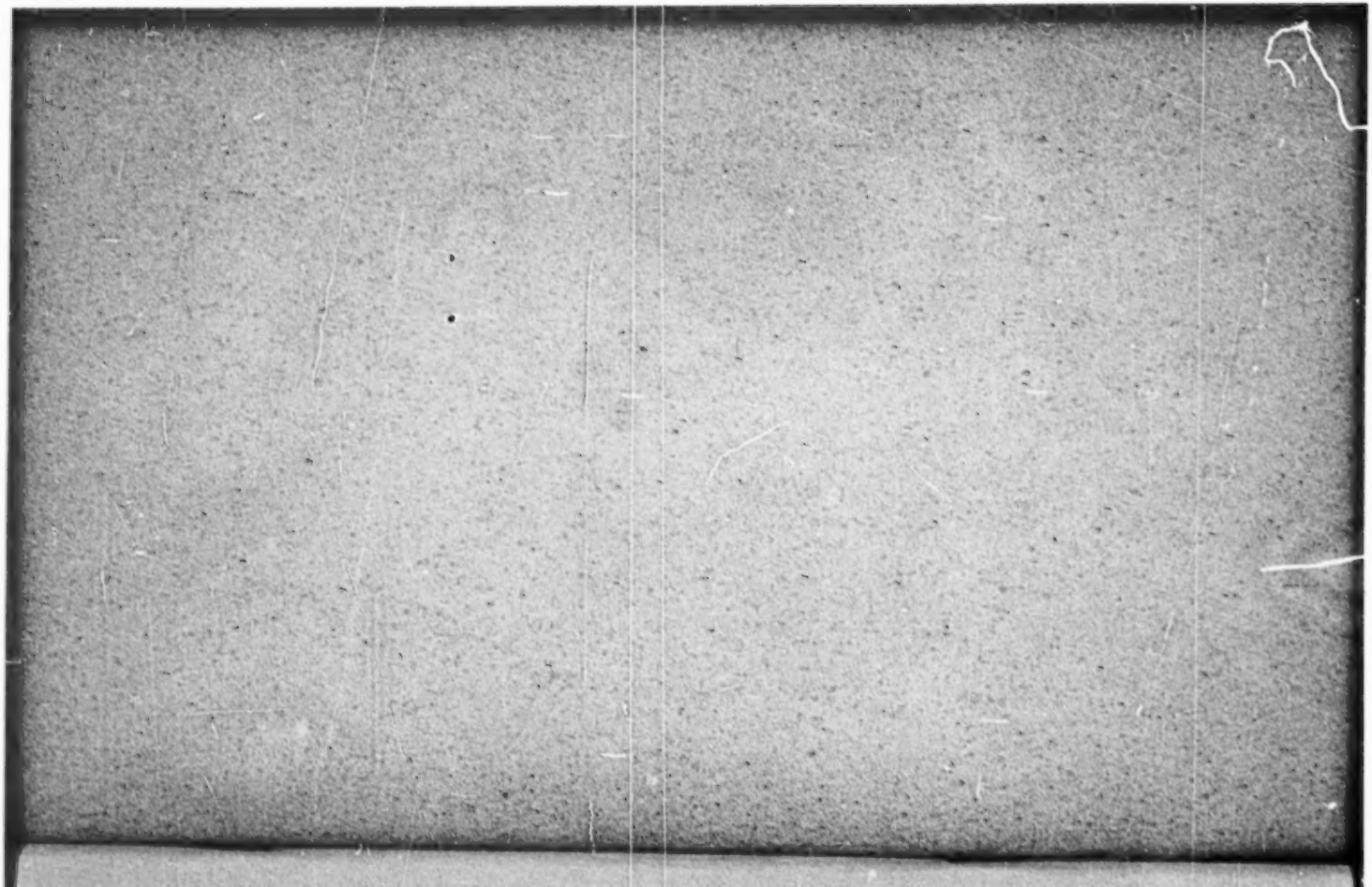

SUPREME COURT, U. S.

No. 74-935

FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUSSEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-935

THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, SAMUEL A. GOLDSMITH, WALTER MULLADY, DR. MARY KELLY MULLANE, DR. ROBERT STEPTO, EDWARD W. HUSSEY, and MICHAEL ROSENBERG, Individual Members of the Chicago Board of Health,

Petitioners,

vs.

FRIENDSHIP MEDICAL CENTER, LTD. and T. R. M. HOWARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents pray that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 505 F.2d 1141 (1974), and appears in Appendix A of the Petition for Writ of Certiorari.

The Memorandum Opinion and Order of the District Court are reported at 367 F.Supp. 594 (N.D. Ill. 1973) and appears in Appendix B of the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional statement is adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court's holding that a woman's right of privacy is broad enough to encompass her decision to have an abortion renders unconstitutional Board of Health regulations which single out abortion clinics for specialized standards and procedures applicable to all abortions, regardless of the trimester, and which are not applied to other surgical procedures of similar complexity and risk.

2. Whether this Court should reject its holding in *Roe* v. *Wade,* that the state's interest in the health and safety of women undergoing abortions does not become compelling until the end of the first trimester of pregnancy.

3. Whether a physician who is closely involved in the abortion decision-making process and who is subject to arrest and loss of his clinic's license for failure to comply with licensing Regulations has standing to chailenge those Regulations on the ground that they interfere with the fundamental right to privacy guaranteed by the Fourteenth Amendment.

ORDINANCES INVOLVED

The Chicago Board of Health regulations for abortion services appear in Appendix C to the Petition for a Writ of Certiorari.

Petitioners have neglected to include one portion of the Chicago Municipal Code that is relevant to this case. Section 9-5 of the Code states:

> The president of the board of health, the assistant to the president of the board of health, the secretary of the board of health, the commissioner of health, and all physicians, employes or inspectors, who may be designated by the board of health shall have full police powers and shall have the right to arrest or cause to be arrested any person who violates any of the health provisions of this code.

STATEMENT OF THE CASE

The Statement of the Case is adequately presented in the Petition. For greater detail, this Court may refer to the Statement in Respondents' Brief filed in the Seventh Circuit Court of Appeals below.

REASONS FOR DENYING THE WRIT

Introduction

The unanimous decision below by the United States Court of Appeals for the Seventh Circuit is in total compliance with *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973). This case tenders no issues which have not already been resolved by this Court in its well-considered opinions in those cases.

I.

BECAUSE THIS COURT HAS RULED THAT THE STATE HAS NO COMPELLING INTEREST IN REGULATING ABORTIONS PERFORMED IN THE FIRST TRIMESTER OF PREGNANCY, PETITIONERS PRESENT NO NEW QUESTIONS OF FEDERAL LAW AND THE SEVENTH CIRCUIT'S RULING DOES NOT MERIT REVIEW.

This Court's decisions in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton, supra,* held that the right of personal privacy guaranteed by the due process clause of the Fourteenth Amendment encompasses the right of a woman and her physician to terminate the woman's pregnancy. *Roe* v. *Wade, supra,* at 154. In those cases this Court declared that the fundamental right of privacy can be restricted only by the demonstration of a compelling and necessary state interest. *Id.,* at 155.

Nevertheless, Petitioners maintain that because the City's police powers are being invoked to protect the

health and safety of women undergoing abortions,* a rational relationship need only be established between the City ordinance and the end it seeks to promote. Petitioners' Brief for Certiorari [hereinafter "Petition"] at 12. This hypothesis overlooks the fundamental nature of the right to privacy, and ignores the judicial test mandated by countless Supreme Court decisions.

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. *Griswold* v. *Connecticut,* 381 U.S. at 485; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308 (1940); *see Eisenstadt* v. *Baird,* 405 U.S. at 460, 463-464 (White, J., concurring in result.)

Roe v. *Wade, supra,* at 155-156.

The Petitioners assert the right to regulate extensively abortion clinics without regard for the stage of pregnancy. However, this Court has already ruled that the state's interest in the health of the mother does not become compelling until the end of the first trimester of pregnancy.

---

* At one point Petitioners' claim this is the "sole" purpose behind the regulations. Petition, at 3. The Regulations themselves belie the falsity of this claim. Regulation XVI(e), for example, requires that a woman wait at least twenty-four hours between the time of her initial examination by the doctor and the termination of the pregnancy ". . . to permit the reporting to and review of all laboratory tests by the examining physician and *to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy.*" Petition, Appendix C, at 57a (Emphasis added). That such a requirement directly affects the decision to have an abortion can hardly be doubted.

> *With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester . . . It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.* Examples of permissi ble state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; *as to licensing of the facility; and the like.*
>
> *This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.*

Roe v. *Wade, supra,* at 163. (Emphasis added).

The Court of Appeals below did not, as Petitioners maintain, "seize" on this language in the Supreme Court's opinion. Petition, at 9. Rather, the Court of Appeals followed the *Roe* holding which was clearly enunciated by this Court.

To summarize and to repeat: . . .

> (a) For the stage prior to approximately the end of the first trimester, *the abortion decision and its effectuation* must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage *subsequent to approximately the end of the first trimester*, the State, in promoting its interest in the health of the mother, may, if it chooses,

> regulate the abortion procedure in ways that are reasonably related to maternal health.

410 U.S. at 164 (Emphasis added).

In *Roe* v. *Wade*, this Court invalidated state statutes precisely because they attempted to regulate abortion without regard to the stage of pregnancy. Similarly, in *Doe* v. *Bolton*, the Court considered a hospital requirement failing to exclude the first trimester of pregnancy and concluded:

> We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy . . . is also invalid.

410 U.S. at 195.

These holdings unequivocally prohibit state intervention in the abortion decision-making process or in the manner in which such a decision is effectuated during the first trimester. Despite this fact, Petitioners assert a right to regulate "where, how and by whom an abortion may be performed" regardless of the stage of pregnancy. Petition, at 9. This Court has clearly held that such regulations may be proper *after the first trimester* of pregnancy but only when they are reasonably related to the state's interest. *Roe* v. *Wade*, *supra*, at 163.

This Court has held that during the early stages of pregnancy the abortion decision "*in all its aspects* is inherently and primarily a medical decision, . . ." *Roe* v. *Wade*, *supra*, at 166, (Emphasis added).* The Seventh Circuit acknowl-

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* Petitioners' reliance on *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973) is ill-founded. *Rodriguez* was concerned with the constitutional relationship of disparate rights (education, voting and freedom of speech). In this case we are concerned with *one* distinct right—the right to make and effectuate the decision to have an abortion during the first trimester of pregnancy. The decision to have an abortion is intricately related to the procedures and expenses involved. During the first trimester, the standards of the medical profession, not the state, must be looked to for necessary guidance and direction.

edged, as did this Court, that appropriate remedies are available should any physician abuse the privileges of his or her position. *Roe* v. *Wade, supra* at 166; *Friendship Medical Center, Ltd.* v. *Chicago Board of Health, et al.*, 505 F.2d 1141, 1152-53 (7th Cir. 1974). The Seventh Circuit's holding that the Abortion Regulations constituted an unnecessary encroachment upon the physician's right to exercise his medical judgment was mandated by this Court's 1973 abortion decisions. A contrary decision would have discounted ". . . the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health." *Doe* v. *Bolton, supra*, at 208 (Burger C.J., concurring).

We emphasize, as did the Court of Appeals, that this is not a case where the City purports to regulate abortions ". . . as it does other surgical procedures . . ." *Roe* v. *Wade, supra* at 170-171 (Stewart, J., concurring.) Rather, as Petitioners concede, the Board of Health has singled out abortion procedures for regulations that do not apply to other medical procedures of the same risk and complexity. The Seventh Circuit determined that this regulatory scheme violated the Equal Protection Clause of the Fourteenth Amendment because it adversely affected the fundamental right of privacy enunciated in *Roe* v. *Wade* by treating differently without a compelling reason medical procedures which are indistinguishable in terms of health risks. *Friendship Medical Center, supra*, 505 F.2d at 1153.

Because of the sweeping overbreadth of the Abortion Regulations, this Court need not decide what legal presumption should be given to health and safety ordinances affecting second trimester abortions. We note however, that in arguing for a presumption of statutory validity, Petitioners once again ignore the fundamental nature of the right to privacy. *See supra* at p. 5. This right

remains operative throughout a woman's pregnancy. *Roe* v. *Wade, supra,* at 159. Consequently, while the ruling was unnecessary to its decision in this case, the Seventh Circuit was correct in concluding that the government must demonstrate that regulations affecting second trimester abortions are reasonably related to a valid state interest.

The Seventh Circuit's opinion is not in conflict with any other Court of Appeals' decisions and is supported by the overwhelming weight of judicial authority. When confronted with regulations similar to those promulgated by the Chicago Board of Health, the Eighth Circuit reached a conclusion identical to that reached by the Seventh Circuit. *Word* v. *Poelker*, 495 F.2d 1349 (8th Cir. 1974). The Court noted therein that:

> While we agree with appellee that the ordinance does not proscribe abortions, we do not agree that that fact, of itself, removes the ordinance from the constitutional realm of *Roe* and *Doe*. The *Doe* decision clearly struck down portions of the Georgia statute governing abortion procedures. *Doe* at 192-200. We learn from *Doe* that sweeping regulation of the abortion procedure without regard for the conflicting interests involved will not withstand constitutional scrutiny.

495 F.2d at 1351.

Similarly, even before *Roe* v. *Wade, supra,* the U.S. Court of Appeals for the District of Columbia suspended enforcement of an abortion clinic regulation to prevent "irreparable injury" in a case strikingly similar to the present one. *WONAAC* v. *D. C. City Council*, No. 72-2010 (D.C. Cir. 1972) (not reported) (*See,* Appendix A, *infra*).

Other courts have also recognized that the regulation of abortions by the state in the first trimester of pregnancy is invalid. In *Coe* v. *Gerstein*, 376 F. Supp. 695, 696 (S.D.

Fla. 1973) (three judge panel), *appeal dismissed, cert. denied per curiam* 417 U.S. 279 (1974), the government itself expressly abandoned its defense of Florida's regulations affecting first trimester abortions after the decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* were announced. A three judge federal panel in Minnesota also concluded that state regulation of abortion procedures could not be justified during the first trimester. *Hodgson* v. *Spannus*, 378 F. Supp. 1008 (D.C. Minn. 1974), *appeal dismissed*, 43 USLW 3415 (1974).

The same result was reached in *Hallmark Clinic* v. *Department of Human Resources*, 380 F. Supp. 1153 (E.D. N.C. 1974), where a three judge panel held the state's requirement that an abortion clinic secure a written transfer agreement with a local hospital infringed on the woman's right to a first trimester abortion free of state interference.

In addition, the New York Court of Appeals invalidated first trimester regulations in *People* v. *Dobbs Ferry Medical Pavilion*, 33 N.Y.2d 584, 301 N.E.2d 435 (1973) (per curiam). Moreover, officials in New York City and the State of Washington have voluntarily withdrawn their first trimester abortion clinic regulations acknowledging that they were constitutionally invalid. *See* Appendix B and Appendix C to this brief, *infra*.*

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* The law review analyses of post-*Roe* abortion legislation agree that the only legitimate qualification on first trimester abortion procedures is that a physician perform the operation. *See, e.g.*, Comment, *A Proposed Statute for Implementing The Abortion Decisions*, 13 Journal Family Law 332, 334-336 (1973-1974); Comment, *Landmark Abortion Decisions: Justifiable Determination or Miscarriage of Justice?—Proposals for Legislative Response*, 4 Pacific L.J. 821, 848-850 (July 1973); Recent Legislation, *Constitutional Validity of the Tennessee Abortion Statute*, 4 Memphis St. U. L. Rev. 593, 594 (1974).

Against this overwhelming body of authority, Petitioners can cite no instance in which any court has upheld regulations affecting first trimester abortions after acknowledging the fundamental nature of a woman's decision to terminate her pregnancy. No conflict exists among the various Circuits necessitating a ruling from this Court. Because this Court has already ruled that the state's interest in protecting a woman's health becomes compelling only at the end of the first trimester of pregnancy, the Seventh Circuit's decision is correct and the Petition for a Writ of Certiorari should be denied.

II.

THE SEVENTH CIRCUIT'S FINDING THAT RESPONDENTS HAD STANDING TO CHALLENGE THE ABORTION REGULATIONS AS AN UNCONSTITUTIONAL INTERFERENCE WITH THE FUNDAMENTAL RIGHT OF PRIVACY WAS BASED ON THE HOLDINGS OF THIS COURT AND IS CONSISTENT WITH ALL OTHER CIRCUIT COURT OPINIONS.

In *Doe* v. *Bolton, supra,* this Court concluded that licensed physicians consulted by pregnant women had standing to challenge Georgia's anti-abortion statute. 410 U.S. at 188. It was conceded that the doctor-plaintiffs in that case had not been prosecuted or threatened with prosecution for violation of those statutes. Nevertheless, this Court held that:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a

> criminal prosecution as the sole means of seeking relief.

Id., at 188.

In its well-reasoned opinion, the Seventh Circuit perceived what Petitioners have repeatedly failed to acknowledge: namely, that the Abortion Regulations promulgated by the Board of Health are directly supported by Municipal Code provisions that give the Board "full police powers" enforceable by the "right to arrest" violators of the health provisions of the Code. Chicago Municipal Code § 9-5.

Moreover, the Abortion Regulations specifically provide for the closing down of facilities deemed in non-compliance with the Regulations. As the Court of Appeals aptly noted:

> It is precisely this continuing restrictive effect placed on the plaintiffs by the regulations which is the basis of this complaint.

Friendship Medical Center, supra, 505 F.2d at 1146. Like the statute under attack in *Doe* v. *Bolton, supra,* the Abortion Regulations are "recent and not moribund." 410 U.S. at 188. Consequently, Petitioners' reliance on *Poe* v. *Ullman,* 367 U.S. 497 (1961), is misplaced. Given these governmental sanctions, Respondents clearly alleged a sufficient personal stake in the controversy to afford them standing to challenge the Abortion Regulations.

Petitioners' contention that the Respondents lacked standing to challenge the Abortion Regulations as an unreasonable interference with the fundamental right of privacy protected by the Fourteenth Amendment is totally without merit. The Seventh Circuit properly followed this Court's holdings in *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965), *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-446 (1972), and *Doe* v. *Bolton, supra,* 410 U.S. at 188-189.

The attending physician's role in the abortion decision is so intimate and central that it would be incongruous not to allow him to challenge the Abortion Regulations on privacy grounds.

> . . . for the period of pregnancy prior to this "compelling" point, *the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated.*

Roe v. *Wade, supra,* at 163 (Emphasis added).

The Abortion Regulations impermissibly infringe on the fundamental right of a woman and her physician to decide to terminate the woman's pregnancy. Because of the unique quality of the doctor-patient relationship in this context, and for the other reasons amply delineated in the Seventh Circuit's opinion, the Court was correct in holding that Respondents had standing to attack the Abortion Regulations as an interference with the right to privacy protected by the Fourteenth Amendment.

There is no conflict among the various Circuits as to a physician's standing to raise the privacy challenge. In *Abele* v. *Markle,* 452 F.2d 1121, 1125 (2d Cir. 1971), *vacated on other grounds,* 410 U.S. 951 (1973), the Court held that the physician-plaintiffs alleged a sufficient threat of personal harm to give them standing to challenge Connecticut's anti-abortion law on privacy grounds. The Eighth Circuit reached a similar conclusion in *Nyberg* v. *City of Virginia,* 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed, cert. denied,* 43 U.S.L.W. 3224 (1974).* In a reference

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* The standing of physicians to challenge abortion regulations on privacy grounds was unquestioned in several other cases. *Word* v. *Poelker,* 495 F.2d 1349 (8th Cir. 1974); *Hallmark Clinic* v. *Department of Human Resources,* 380 F.Supp. 1153 (E.D.N.C. 1974); *Hodgson* v. *Spannus,* 378 F.Supp. 1008 (D.C. Minn. 1974). *See also, Doe* v. *Scott,* 321 F.Supp. 1385 (N.D. Ill. 1971) (three judge court), *vacated on other grounds,* 410 U.S. 950 (1973).

to the Supreme Court's discussion of the standing issues in *Doe* v. *Bolton*, the Eighth Circuit in *Nyberg* noted:

> The impact of the Court's discussion cannot be fairly said to limit standing to sue in abortion cases to pregnant women . . . Clearly, the claims of medical doctors to 'freely practice medicine according to the highest medical standards without arbitrary outside restraints' are inexplicably bound up with the privacy rights of women who seek abortions.

495 F.2d at 1344.

The Seventh Circuit's ruling that Doctor Howard and the Friendship Medical Center had standing to challenge the Abortion Regulations as an invasion of the right to privacy protected by the Fourteenth Amendment is consistent with all other Court of Appeals' decisions and with prior opinions of this Court. Consequently, the Seventh Circuit's opinion does not merit review.

CONCLUSION

Respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit
September Term, 1972

No. 72-2010 Civil Action 1991-72

Wonaac, Laurel Clinic, Inc.
Dr. Milan M. Vuitch, et al.,
Appellants

v.

District of Columbia City
Council, et al.,
No. 72-2011 Civil Action 1993-72
Mathias J. Coleman, M.D.
Summit Medical Center, Inc.,
et al.,
Appellants

v.

Walter E. Washington, et al.,
No. 72-2012 Civil Action 2001-72
Pre-Birth, Inc.,
Appellants

v.

John A. Nevius,
et al.,

Before: Wright and Robinson, Circuit Judges

O R D E R

On consideration of appellants' motion for stay and interlocutory injunction, it appearing to the Court that a serious question regarding the validity of the Abortion

Control Regulation of the District of Columbia has been raised; and it further appearing that enforcement of the Regulation may result in irreparable injury to the parties at whom the Regulation is directed, it is

Ordered that enforcement of the Regulation is stayed pending further order of the District Court, following a hearing afforded the parties with all possible speed on appellants' motions for a preliminary injunction. See *Application of the President and Directors of Georgetown College, Inc.*, 118 U.S. App. D.C. 80, 331 F.2d 1000, cert. denied, 377 U.S. 978 (1964); *Dilworth* v. *Riner*, 343 F.2d 226 (5th Circuit 1965).

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WONAAC, et al.,

Plaintiffs

Civil Action No. 1991-72 v.

D. C. CITY COUNCIL, et al.

Defendants

PRE-BIRTH, INC.

Plaintiffs

Civil Action No. 2001-72 v.

JOHN A. NEVIUS, et al.

Defendants

MATHAIS J. COLEMAN, M.D., et al.

Plaintiffs

Civil Action No. 1993-72 v.

WALTER E. WASHINGTON

Defendant

ORDER

This matter having come before the Court upon defendants' motion to dismiss, together with memorandum of points and authorities in support thereof, and it appearing to the Court that the instant case is now moot, it is, by the Court, this 9th day of February, 1973,

Ordered: That the complaint be, and the same is, hereby dismissed as moot.

/s/ J. H. Pratt
Judge

APPENDIX B

THE CITY OF NEW YORK

HEALTH SERVICES ADMINISTRATION

Date March 30, 1973

To—

Joseph Cimino, M.D., M.P.H.
Chairman, Board of Health

From—

Harold Stults, Counsel N.Y.

Subject—

Constitutionality of the Regulation of First Trimester Abortions under Article 42 of the Health Code in light of *Roe* v. *Wade*, ... U.S. ..... (Wade), and *Doe* v. *Bolton*, ... U.S. ..... (Bolton)

You have asked for my opinion on the effect of the Supreme Court's *Wade* and *Bolton* decisions on the N.Y.C. Health Code provision (in Article 42) affecting first trimester abortions. This opinion is based upon an analysis of the guiding principles the Court used in *Wade* and *Bolton*, which I believe would guide the Court in determining the constitutionality of regulations like those found in Article 42.

The Court concluded that for first trimester abortions

> "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician . . . free of interference by the State." (*Wade*, at 48, 49).

Only beginning with second trimester abortions may a state

> "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." (*Wade* at 47, 48).

Although the rationale for this sharp distinction between first and second trimester abortions is not clear, it

is primarily based upon the increase in the risk to a woman's health from an abortion that occurs after the first trimester. The Court determined that maternal health is adequately protected in first trimester abortions (as in other surgical procedures), by State requirements for the licensing of physicians, by license revocation or suspension proceedings, and by malpractice lawsuits, and it ruled that any regulations that have the effect of limiting a woman's right to have a first trimester are unconstitutional, even though these regulations are directed at further protecting maternal health. In other words, the test that is to be applied in determining whether first trimester abortion regulations are constitutional is not whether the regulations are reasonable or necessary to protect maternal health. The sole test for first trimester abortion regulations is whether the regulations permit the woman, together with her physician, to terminate her pregnancy without government interference.

Hence, Article 42 of the Health Code, as far as first trimester abortions are concerned, must be amended to eliminate any regulation which *de facto* would interfere in any significant way with a mother's ability to exercise her right, together with her doctor, to terminate her pregnancy. No regulation may, therefore, limit a woman's right to an abortion *indirectly* through restrictions on her doctor that would, for example, require the doctor to work in a specific manner, with specific equipment and staff, or in a specific type of facility. Included in this first trimester prohibition would be any *prior* registration or reporting requirements, which if not complied with, would prevent a physician from performing first trimester abortions.

The sections of the Health Code which require data collection, termination of pregnancy certificates and other incidental *post*-abortion clerical acts, however, in no sig-

nificant way interfere with a woman's right and ability, together with her physician, to terminate her pregnancy during the first trimester. Since they do not affect a woman's constitutional rights, they are permissible controls on first trimester abortions. The needed changes in Article 42 vis-a-vis first trimester abortions may be brought about in two basic steps:

1. Sections 42.21(b) and 42.33(a) are the only sections of Article 42 which deal only with first trimester abortions, and *permit* outpatient procedures. Since under *Wade* and *Bolton* we cannot require any particular modality or treatment for first trimester abortions, regulations permitting a particular type of treatment now have very little meaning. Therefore, both these sections should be eliminated.

2. Almost all the remaining sections would significantly limit a woman's right to have her pregnancy terminated by restricting her doctor's manner of practice, use of equipment and staff or work in a particular type of facility or by requiring the doctor's *prior* registration. These sections should be redefined to omit reference to first trimester abortions, although post-abortion clerical requirements and the general enforcement provisions of Article 42 (found in §§42.03(c), 42.05, 42.07, 42.09, 42.34) may be retained. These changes may be accomplished by first amending section 42.01(a) to read as follows:

> (a) Abortion service means a place or facility in which abortions *on patients with a gestation of more than twelve weeks* are performed (.) *except that for the purposes of §§ 42.03(c), 42.05, 42.07, 42.09, 42.34, abortion service means any place or facility in which abortions are performed.*

and by amending the first sentence of §42.03(a) to read:

> (a) No person shall maintain or operate or represent himself as maintaining or operating an abortion

service *in which abortions on patients with a gestation of more than twelve weeks are performed* unless he first registers such service with the Department.

By amending these two subsections in this way, all prior restraints on a mother's right to have her physician perform an abortion are eliminated.

The Board of Health may of course consider new regulations applicable to first trimester abortions so long as they are designed to comply with the Supreme Court's guidelines as discussed above. Such new regulations would be permissible if, like the termination of pregnancy certificate requirement and the post abortion data requirement, they would interfere in no significant way with a woman's right and ability to have her doctor terminate her pregnancy during the first trimester. On the other hand, they could not indirectly limit a woman's rights by restricting her doctor through, for example, requiring specified types of treatments, type of facilities, equipment or staffing. Other post-abortion clerical requirements, if not burdensome, would probably satisfy the Supreme Court's guidelines in this area.

Non-binding standards of an advisory or informational nature, even if officially sanctioned would also be permitted since they do not interfere with a woman's right, together with her physician, to terminate her pregnancy. Such non-binding standards, and the evaluation of specific physicians or abortion services in light of those standards may be publicized.

There remain some unresolved questions concerning the constitutionality of certain Article 42 provisions affecting second trimester abortions. These questions relate primarily to whether it can be shown that certain provisions are important enough to the protection of maternal health to meet constitutional standards. These questions will be dealt with in a subsequent opinion.

APPENDIX C

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
HEALTH SERVICES DIVISION

M E M O R A N D U M

To:

Hospitals and Medical Facilities for the Termination of Pregnancy

From:

Licensing and Certification Section
Offiice of Planning and Health Facilities

Subject:

Amendment To Abortion Regulations

The Washington State Board of Health took action at its April 5, 1973, meeting to amend the Medical Facility for Termination of Pregnancy Rules and Regulations, WAC 248-140, to bring them into line with the recent United States Supreme Court decisions on abortions. The following regulations are in effect for 90 days beginning April 9, 1973.

"WAC 248-140-150 HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. For the purpose of preserving and protecting maternal health, all abortions performed during the second trimester of pregnancy shall be performed only in hospitals licensed pursuant to chapter 70.41 RCW: PROVIDED, That a termination of pregnancy during the second trimester may be induced in a facility other than a licensed hospital so long as final termination takes place in a licensed hospital: PROVIDED

FURTHER, That abortions during the second trimester may be performed outside licensed hospitals when the physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency.

WAC 248-140-152 FINDING OF EMERGENCY. The board of health finds that the immediate adoption of these rules is necessary for the preservation of the public health, safety and welfare.

The effect of this amendment is to repeal from WAC 248-140 sections WAC 248-140-020 through WAC 248-140-130 and to add the above quoted sections to WAC 248-140-010, the purpose statement of these rules and regulations.

The State will no longer regulate or issue certificates to facilities performing a first trimester termination.

During the second trimester, hospitals licensed under RCW 70.41 are the only medical facilities approved by the Board of Health for termination of pregnancy (RCW 9.02.070). At this time, no approval is required for those non-hospital facilities where a second trimester termination is induced. Where second trimester terminations are induced in a non-hospital facility, the final termination must take place in a licensed hospital. The Board of Health will consider permanent adoption of amendments to WAC 248-140 at a public hearing in Olympia on June 7, 1973.

TR:kh

(Letterhead of Washington State Hospital Association)

BULLETIN

June 8, 1973

No. 1756
To: Administrators
From: Curt Fortney, associate director
Re: Board of Health on Abortions and Nurseries

The Washington State Board of Health, meeting in Olympia yesterday, took action in two areas of particular interest to hospitals.

ABORTION

The Board approved new regulations which permit abortion during the second trimester to be induced in a facility other than a hospital provided that final termination takes place at a hospital. The board also approved a regulation to allow abortions to be performed during the second trimester outside licensed hospitals when a physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency.

In cases where an abortion is induced outside the hospital and terminated inside the hospital the physician will make a report on the first part of the procedure and the hospital will report only upon the portion of the procedure accomplished at the hospital. The State Division of Health will provide new forms for this purpose in the near future.

HOSPITAL NURSERIES

The Board changed existing requirements that nurses and other personnel regularly assigned to the nursery "shall wear short-sleeved scrub dresses or uniforms with a clean gown and should wear masks."

The new language reads: "Nurses and other personnel regularly assigned to the nursery shall wear short-sleeved scrub dresses or uniforms covered with a clean, long-sleeved gown." The requirement for masks has been deleted.

A second change provides that all persons not regularly assigned to the nursery shall wear a clean, long-sleeved gown before handling infants or coming in contact with clean equipment such as bassinets, incubators and examining tables. The old requirement that caps and masks be worn was deleted.

The third change concerns handwashing. Previously the regulations stated that "strict handwashing techniques shall be maintained by physicians and nurses." The new rule reads: "Prior to touching babies or clean equipment such as bassinets, incubators, and examining tables, all persons must wash their hands. Handwashing is required before handling each baby. The handwashing procedure shall be that approved by the infection control committee."

The new regulations will be effective thirty (30) days after the regulations are published probably next week.